

service rule that prohibits CMRS carriers from providing connectivity to ISPs.³⁰ Therefore, ASAP concludes that the service it provides to ISPs is incidental to its CMRS authority.

CenturyTel disagrees with ASAP and argues that the service ASAP provides to ISPs is not CMRS or incidental to CMRS because it does not use the wireless spectrum or a mobile station. CenturyTel cites 47 C.F.R. § 22.323, which it describes as a "definition" of incidental service:

Carriers authorized to operate stations in the Public Mobile radio services *may use these stations* to provide other communications services incidental to the primary public mobile service in which the authorizations were issued

CenturyTel emphasizes the phrase "may use these stations" to argue that the rule requires use of a mobile station in order for a service to qualify as "incidental" to CMRS. CenturyTel notes that "mobile station" is defined in the federal Act as "a radio-communication station capable of being moved and which ordinarily does move."³¹ But testimony from ASAP's owner, Mr. Ted Gaetjen, establishes that ASAP's service to ISPs does not use mobile stations, nor does it use the wireless (radio) spectrum.³²

CenturyTel also argues that ASAP has used faulty logic by arguing that ASAP's service to ISPs is incidental to CMRS merely because the Internet happens to be utilized in providing CMRS services. And CenturyTel adds that more than 99% of the traffic to ASAP's NXXs is ISP traffic; consequently, it is hardly "incidental" to the minor amount of CMRS traffic that actually occurs. In short, CenturyTel argues that the service ASAP provides to ISPs is wholly a landline service and is not an "incidental communications service" under 47 C.F.R. § 22.323.

³⁰ Tr. 651.

³¹ 47 U.S.C. § 153(28).

³² Tr. 53, 56- 57. See also, Int. Hrg. Tr. 99-100, 103-104, 105.

Finally, CenturyTel dismisses ASAP's argument that the *Western Wireless* case³³ holds that CMRS providers are not required to obtain a certificate before they provide the functional equivalent of local service.³⁴ CenturyTel states that ASAP failed to mention the Commission's express finding that the service at issue *was a CMRS service*.³⁵ CenturyTel emphasizes that the *Western Wireless* order does not state that every service a CMRS provider offers is exempt from certification, as ASAP claims, but only that a particular service was a CMRS service that was, therefore, exempt from state regulation.

CenturyTel also distinguishes the *Western Wireless* case because it did not address any questions regarding interconnection between the local service provider (Western Wireless) and an interconnecting carrier (here, ASAP) providing service to ISPs. In CenturyTel's view, the issue presented in the present case simply was not before the Commission in *Western Wireless*. Therefore, CenturyTel cites this Commission's decision in *CT Cube* as more appropriate authority. In *CT Cube* an arbitrator found that "it is illogical and would be bad public policy to permit a CMRS, licensed to provide services by radio telecommunications, to behave as if it were permitted to provide wireline services for the purposes of reciprocal compensation." Also, the Commission went on to find that CT Cube (the CMRS provider) was not authorized to terminate landline traffic to ISPs.³⁶

³³ *Application of WWC Texas BSA Limited Partnership for Designation as an Eligible Telecommunications Carrier pursuant to 47 U.S.C. § 214(c) and P.U.C. Subst. R. § 26.148*; Docket Nos. 22289 and 22295, Final Order (Oct. 30, 2000) ("Western Wireless" order).

³⁴ ASAP Brief at 9.

³⁵ See, Docket Nos. 22289 and 22295, Final Order, FOF No. 82: "The service that is the subject of WWC's applications shall be treated as mobile service and therefore entitled to the exemptions from state law afforded CMRS by federal law."

³⁶ See CT Ex. 3, Robinson Direct, at 22; Docket No. 20028, Order at 8.

(b) ALJ's Analysis

The ALJ finds that the service ASAP provides to ISPs is not incidental to ASAP's CMRS authority. The only service that ASAP provides to ISPs is a wireline connection to the PSTN so that the ISPs' customers can access the Internet. This service is not in any manner related to or involved with ASAP's wireless paging service, for which it holds a CMRS license. The only evidence offered by ASAP to support its position was testimony that ASAP uses the Internet to connect with a satellite service in Chicago that transmits ASAP's paging signals and that paging customers use the Internet to receive text messages. But the mere fact that ASAP uses the Internet in providing its paging services does not make connecting ISPs to the PSTN incidental to ASAP's CMRS authority.

The parties have not cited and the ALJ has not found any authority discussing what constitutes a service "incidental to CMRS." Nevertheless, in the ALJ's opinion, for a service to be incidental to ASAP's CMRS authority, the actual service ASAP is providing must be directly related or supplemental to ASAP's provision of wireless paging services to its paging customers. In other words, it must be a service *provided to the paging customers* and it must be *directly related or supplemental to their paging service*. Thus, ASAP's example of voice messaging as an incidental service is correct, because it is supplemental to ASAP's paging service, and it is provided to its paging customers. But connecting various ISPs to the PSTN is not incidental to ASAP's CMRS authority because it is not a service provided to ASAP's paging customers and it is not directly related or supplemental to ASAP's CMRS paging service.

The ALJ does not agree with ASAP that the *Western Wireless* case considered or decided whether connecting an ISP to the PSTN is a service incidental to CMRS. Instead, the Commission simply held that the services Western Wireless did provide would be treated as "mobile service," and that if the services were ultimately determined by the FCC to be "fixed services," then *Western*

Wireless would have to seek state certification and otherwise comply with applicable state law.³⁷ But, in any event, the Commission did not make any decision or even discuss the nature of "incidental services."

Similarly, however, the ALJ also disagrees with CenturyTel that 47 C.F.R. § 22.323 requires use of a mobile station and the wireless spectrum in order for a service to qualify as incidental to CMRS. First, the ALJ concludes that § 22.323 is not a definition of incidental service, as CenturyTel argues, but instead is simply a grant of authority to use mobile stations in providing incidental services, which are not defined.³⁸ In other words, the section merely *allows the use of mobile stations* to provide incidental services, but it does not require that all incidental services *must* use mobile stations, and it does not define "incidental services."

In summary, the ALJ does not find that a service must use the wireless spectrum to be considered "incidental" to CMRS, as advocated by CenturyTel. But the ALJ nevertheless finds that ASAP's service that connects ISPs to the PSTN is not incidental to ASAP's CMRS authority, because the service is not provided to ASAP's CMRS paging customers and is not directly related or supplemental to ASAP's CMRS paging service.

³⁷ Docket Nos. 22289 and 22295, Final Order (Oct. 30, 2000), FOF Nos. 82 and 83; Conclusion of Law No. 8.

³⁸ The ALJ notes that § 22.323 was removed from the Code of Federal Regulations (C.F.R.), effective February 18, 2003. *See*, 67 Fed. Register 77175, 77191 (Dec. 17, 2002). But since the ALJ has determined that this section does not define "incidental services," its removal does not affect the ALJ's conclusions. The definition of "mobile service" at 47 U.S.C. § 153(27) does require use of radio communications (*i.e.*, use of the wireless spectrum), but the parties have not cited and the ALJ has not found any applicable statutory or regulatory definition of "incidental services."

(2) Subissue 2: Is the service jurisdictionally interstate?

(a) Parties' Arguments

ASAP contends that even if the service it provides to ISPs is not incidental to CMRS, it is still beyond the reach of regulation by the Commission because the service is jurisdictionally interstate. According to ASAP, the FCC has ruled several times that facilitating calls "to the Internet" is an interstate service.³⁹ And even though ISPs receive *interstate* information access, they can subscribe to *intrastate* basic business services offered by LECs in order to obtain the interstate information access.⁴⁰ Because Texas PUC cannot exercise regulatory jurisdiction over interstate information service, it cannot require a provider of purely interstate services to ISPs to obtain a state

³⁹ ASAP cites the following: *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (*ISP Declaratory Ruling*); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking*, CC Docket No. 99-68, FCC 99-38, 14 FCC Rcd 3689 (1999) (*"ISP Declaratory Ruling"*); *MTS and WATS Market Structure*, CC Docket No. 78-72, Memorandum Opinion and Order, 97 FCC 2d 682, 711 (1983) (*"MTS/WATS Market Structure Order"*) (ESPs are "[a]mong the variety of users of access service" and "obtain[] local exchange services or facilities which are used, in part or in whole, for the purpose of completing interstate calls which transit [their] location and, commonly, another location."). The FCC, however, exempted ISPs/ESPs from payment of interstate access charges. Instead they are allowed to pay local rates if they choose. This policy is known as the "ESP exemption." See *MTS/WATS Market Structure Order*, 97 FCC 2d at 715 (ESPs have been paying local business service rates for their interstate access and would experience rate shock that could affect their viability if full access charges were instead applied); see also *Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers*, CC Docket 87-215, Order, 3 FCC Rcd 2631, 2633 (1988) (ESP Exemption Order) ("the imposition of access charges at this time is not appropriate and could cause such disruption in this industry segment that provision of enhanced services to the public might be impaired"); *Access Charge Reform Order*, 12 FCC Rcd at 16133 ("maintaining the existing pricing structure ... avoids disrupting the still-evolving information services industry.") While the courts have not been terribly receptive to the FCC's claim that calls to ISPs are not subject to § 251(b)(5) reciprocal compensation, they have never challenged the conclusion that service to an ISP is jurisdictionally interstate. See *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000) (citing *Southwestern Bell v. FCC*, 153 F.3d 523 (8th Cir. 1998)).

⁴⁰ If a LEC provides intrastate "local" service to business customers, ISPs can subscribe to that service using the "ESP Exemption." ISPs also can choose to subscribe to interstate access services. ASAP Exh. 44 (Gaetjen Reb.) at 13.

certificate of authority.⁴¹ Instead, ASAP states that only the FCC has jurisdiction over the “retail” aspect of the service that ASAP provides to ISPs.

ASAP cites *BellSouth MemoryCall* as an example where the FCC considered the jurisdictional nature of traffic that consisted of an incoming *interstate* call to the switch serving a voice mail subscriber, and an *intrastate* transmission of that message from that switch to the voice mail apparatus.⁴² ASAP suggests that the FCC determined that the entire transmission constituted one interstate call, because “there is a continuous path of communications across state lines between the caller and the voice mail service.”⁴³ Thus, in the *BellSouth* case, the FCC preempted a state commission order that attempted to assert jurisdiction over an interstate service, and ASAP suggests that this Commission would fare no better if it attempted to regulate ASAP’s ISP services.

ASAP also cites a decision by Iowa Public Utility Board, which concluded that it had no jurisdiction over a retail dial-up service to ISPs. The applicant (Level 3) filed a state tariff in Iowa covering dial-up service to ISPs, but the Iowa Public Utility Board rejected that tariff because it included only interstate services over which the Board lacked jurisdiction.⁴⁴ In ASAP’s view, the Commission should similarly hold that where a carrier provides service only to ISPs and does not

⁴¹ ASAP does not contend that the Commission has no jurisdiction over a “wholesale” interconnection agreement obtained under § 252 of the Act, an arbitration to establish an interconnection agreement, or a post-interconnection agreement dispute resolution case, even if the competitive carrier provides only interstate service. The Commission does have jurisdiction since it was expressly given power over these “wholesale” matters – even if they relate to a competitive carrier’s purely interstate retail services – by Congress. It is for this reason that the Texas Commission has jurisdiction over Level 3’s petition for Arbitration in Commission Docket 26431. ASAP’s point is that the Commission cannot impose retail entry regulation or rate regulation over ASAP’s interstate services. ASAP Initial Brief at 11, n. 27.

⁴² Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Rcd 1619 (1992) (*BellSouth MemoryCall*).

⁴³ *Id.* at 1620.

⁴⁴ *In Re: Level 3 Communications, LLC*, Docket Nos. TF-02-54; TF-02-55 (TCU-99-1), 2002 Iowa PUC LEXIS 60 (Iowa Utilities Board, Feb. 25, 2002).

provide basic service to residential or business customers, the service is interstate and the Commission has no jurisdiction over the carrier at the retail level.

Finally, ASAP notes that CenturyTel is currently arguing in Docket No. 26431 that service to ISPs is *interstate*, and ASAP cites the following statements from CenturyTel's Brief in that docket:

Under the ISP Order on Remand, ISP-bound traffic is not subject to interconnection under Section 251(c)(2). Rather, this Order concludes that ISP-bound traffic is "interstate" in nature, and falls within the FCC's Section 201 jurisdiction.

...

Alternatively, the FCC held that "ISP-bound traffic, which the [FCC] has long held to be interstate," is under the jurisdiction of the FCC, not the state commissions.

...

the LEC-provided link between an end-user and an ISP is properly characterized as interstate access, and . . . it is the [FCC]'s consistent view that the link LECs provide to connect subscribers with ESPs⁴⁵ is an interstate access service.

...

Thus, ISP-bound traffic is properly classified as interstate, and it falls under the FCC's section 201 jurisdiction. Thus, because of the FCC determination that ISP-bound traffic is interstate in nature and that it falls within the FCC's Section 201 authority, the state commissions have no authority to regulate ISP-bound traffic.⁴⁶

ASAP argues that CenturyTel's statements in Docket 26431 cannot be squared with CenturyTel's position in this case—that ASAP is subject to regulation by the Commission. ASAP concludes that its retail service to ISPs is *interstate* and that the Commission cannot impose entry/exit or rate/service regulation over it.

⁴⁵ ESP refers to an enhanced service provider, which is a company that provides enhanced or value-added services to an end-user.

⁴⁶ ASAP Exh. 20, at 6-8, citing, *Petition of Level 3 Communications, LLC for Arbitration*, Docket No. 26431 (pending)..

In response, CenturyTel argues that if, as ASAP claims, the landline service it provides to ISPs is local ELCS, then the Commission can require ASAP to be certificated as a provider of local exchange service. On the other hand, if the service is an interexchange service, then ASAP must register as an interexchange carrier.⁴⁷ CenturyTel agrees that the Commission does not have authority to *set rates* for what ASAP provides to ISPs, but it argues that the Commission may require ASAP to obtain certification if what ASAP provides to ISPs is a local exchange service, just as the Commission requires certification of other providers of local services.

CenturyTel also states that the PUC has interpreted its authority under PURA § 54.004 to require certification of carriers that provide only access to internet service providers. It cites PUC orders in Docket No. 19621, *Application of Dakota Services Limited for a Service Provider Certificate of Operating Authority*, Order on Certified Issues (issued Oct. 26, 1998) (requiring a provider of xDSL service to be certificated) and Docket No. 20647, *Application of C3 Communications, Inc., for a Service Provider Certificate of Operation Authority*, (order dated May 20, 1999) (approving issuance of a certificate to C3 as a provider of "data-only services (remote LAN access and internet access), long-haul transport [an interexchange service] and access service," and finding specifically that "Applicant will not provide dial tone services," (Finding of Fact No. 12)).⁴⁸

CenturyTel also responds that the *Bell South Memory Call* order cited by ASAP does not prohibit state certification of a carrier providing a service to ISPs. Rather, it finds that a particular service—voice mail—to be interstate in nature and pre-empts a Georgia State Commission decision only to the extent it precluded a carrier from offering this retail service. In fact, CenturyTel adds,

⁴⁷ See CenturyTel Initial Brief at 8-10.

⁴⁸ CenturyTel states that it has only asserted that the FCC's ISP Remand Order pre-empts the PUC from establishing terms of interconnection between an ILEC and CLEC as to ISP-bound traffic. This position is not inconsistent with the state's authority to require certification of those carriers providing such access to ISPs in Texas. ASAP provides no authority for the proposition that a state may not require certification of carriers who provide access to ISPs. CenturyTel Reply Brief at 11, n. 4.

that order expressly declined to pre-empt other regulatory controls which the Georgia Commission asserted over the service.⁴⁹ Further, CenturyTel argues that the *Iowa* order cited by ASAP only addressed whether a CLEC (Level 3) could tariff its services to ISPs, not whether the State of Iowa could require Level 3 to obtain a certificate before providing the service. Therefore, CenturyTel concludes that the Commission is not preempted from requiring ASAP to obtain a certificate to provide local exchange service based solely on the interstate nature of the call.

(b) ALJ's Analysis

Because calls to ISPs use a combination of intrastate and interstate services and facilities, the FCC has found that such calls are jurisdictionally "mixed." That is, they have both intrastate and interstate components. And when telecommunications are jurisdictionally mixed, the FCC and courts have ruled that state regulation of the *intrastate* service that affects interstate service is *not preempted* unless it thwarts or impedes a valid federal policy.⁵⁰ Further, the ALJ finds that ASAP's actual service to ISPs occurs entirely within the state of Texas and, thus, is an *intrastate* component of the overall jurisdictionally mixed telecommunication service. Therefore, the interstate component of calls to ASAP's ISP customers does not, *per se*, prohibit the Commission from enforcing its certification or registration requirements on ASAP's intrastate component of the calls. Instead, the Commission must determine whether the intrastate services provided by ASAP require registration or certification (discussed in the issues below) and, if so, whether requiring ASAP to register or obtain a certificate would thwart or impede a valid federal policy.

Initially, the ALJ notes that the characterization of a call to an ISP as an interstate call to a distant website, or as an intrastate call to the local ISP, has been a fiercely litigated issue in recent

⁴⁹ Petition for Emergency Relief and Declaratory Ruling Filed by BellSouth Corporation, 7 FCC Red 1619 (1992) (*BellSouth MemoryCall*), at ¶¶ 6, 22.

⁵⁰ *Id.*

years due to intercarrier compensation implications. If a call to an ISP is handled by two carriers within a local calling area, and is characterized as terminating at the local ISP facility, then the call could be treated as an intrastate local call. Under those circumstances, the originating carrier (CenturyTel in this case) would normally pay termination charges to the carrier that terminates the call. Naturally, ILECs such as CenturyTel oppose this interpretation, which explains CenturyTel's position in Docket No. 26431. On the other hand, if such a call is considered as one continuous call through the ISP, across the Internet, and terminating at a distant web page or e-mail site, then the call could be considered an *interstate* long-distance call, and intercarrier compensation would be regulated by the FCC under § 201 of the federal Telecommunications Act.⁵¹

In 1999, the FCC decided in its *ISP Declaratory Ruling*⁵² that telecommunications traffic delivered to ISPs is jurisdictionally "mixed," but predominantly interstate, and therefore subject to the FCC's jurisdiction under § 201 of the federal Act.⁵³ To reach this conclusion, the FCC applied an "end-to-end" analysis and noted that typically the communication will ultimately extend beyond the ISP to websites out-of-state and around the world. This FCC's decision was appealed, however, and in *Bell Atlantic Cos. v. FCC*, the D.C. Circuit Court of Appeals vacated the ruling and remanded the case to the FCC for further consideration.⁵⁴ The court noted that "Calls to ISPs are not quite local, because there is some communication taking place between the ISP and out-of-state websites. But they are not quite long distance, because the subsequent communication is not really a continuation, in the conventional sense, of the initial call to the ISP."⁵⁵ The court was concerned that

⁵¹ 47 U.S.C. § 201.

⁵² *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689 (1999) (*ISP Declaratory Ruling*).

⁵³ This section grants the FCC jurisdiction for interstate telecommunications.

⁵⁴ *Bell Atlantic Tel. Cos. v. FCC*, 296 F.3d 1 (D.C. Cir. 2000).

⁵⁵ *Id.* at 5.

the FCC had not given a sufficient explanation on why its end-to-end analysis was appropriate for determining the intercarrier compensation, so it remanded the case for further evaluation and explanation. After further consideration, the FCC issued its *Remand Order*, in which it again found that ISP-bound traffic is not local because it does not originate and terminate within a local area. Instead, the FCC decided that such calls are “*jurisdictionally mixed*” but largely interstate; thus intercarrier compensation for such calls should be regulated by the FCC.⁵⁶

Based on the FCC’s ruling in the *Remand Order*, it is clear that calls to ASAP’s ISP customers are exclusively regulated by the FCC *for purposes of intercarrier compensation*. But this fact alone does not necessarily mean that the Commission completely lacks jurisdiction over ASAP’s landline services or that ASAP is exempt from the Commission’s certification or registration requirements. Indeed, this same preemption argument was raised but rejected by the Fifth Circuit Court of Appeals in *Southwestern Bell Tel. Co. v. Public Util. Comm.*:

The Supreme Court has recognized that the Act cannot divide the world of domestic telephone service “neatly into two hemispheres,” one consisting of interstate service, over which the FCC has plenary authority, and the other consisting of intrastate service, over which states retain exclusive jurisdiction. (citation omitted) Rather, observed the Court, “the realities of technology and economics belie such a clean parceling of responsibility.” . . . Accordingly, we hold that here the PUC properly exercised its jurisdiction regardless of any interstate aspect of the subject telecommunications.⁵⁷

⁵⁶ *Implementation of the Local Competition Provision in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, F.C.C. 01--031 (2001), 16 F.C.C. Rcd. 9161 (2001) (*Remand Order*). The ALJ has provided only a very basic explanation of this issue. For a much more in-depth discussion, see the FCC Remand Order.

⁵⁷ 208 F.3d 475, at 480 (5th Cir. 2000). See, *Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355, 360, 106 S.Ct. 1890 (1986).

Likewise, the Iowa Utilities Board case cited by ASAP does not hold that the provider (Level 3) was exempt from certification by the Board. Instead, the order merely rejected a tariff filed by Level 3 that included only interstate telecommunications. Further, the Iowa Board's order also indicates that it considered Level 3 to be a local exchange carrier, which would require certification, even though the specific services described in the proposed tariff were not subject to the Board's rate regulation authority.⁵⁸

ASAP also overstates the ruling in the *BellSouth* case. In that case, the FCC held that the voice mail service in question was "jurisdictionally mixed," and that the state *could regulate* the intrastate components of the service *so long as it did not impede a valid federal policy*. But the FCC then invalidated an order by the Georgia Public Service Commission that prohibited a voice mail service offered by BellSouth, because the FCC determined that the state order did in fact thwart a valid federal policy:

We have recently had occasion to reiterate that Congress intended interstate communications to be regulated exclusively by the [FCC]. Where, as here, interstate services are jurisdictionally "mixed" with intrastate services and facilities otherwise regulated by the States, *state regulation of the intrastate service that affects interstate service will not be preempted unless it thwarts or impedes a valid federal policy*.⁵⁹

Therefore, if ASAP's part of the telecommunication with the ISPs is intrastate in nature, then this Commission is not preempted from regulating ASAP's *intrastate* part so long as the regulation does not thwart or impede a valid federal policy related to the *interstate* component of the service. The ALJ finds that the service provided by ASAP to ISPs occur entirely within the state of Texas.

⁵⁸ "In the ISP Remand Order, the FCC declared that ISPs may purchase ordinary business lines for carrying dial-up data traffic, pursuant to a local exchange carrier's intrastate tariff. . . . However, this requires that the *local exchange carrier (Level 3 in this case)* offer ordinary business line service, which is not part of Level 3's proposed tariff." *In Re: Level 3 Communications, LLC*, Docket Nos. TF-02-54; TF-02-55 (TCU-99-1), 2002 Iowa PUC LEXIS 60 (Iowa Utilities Board, February 25, 2002) at n.2.

⁵⁹ *BellSouth* at ¶ 6.

According to the evidence, ASAP's only service to ISPs is a wireline connection from ASAP's switch, located in Austin, to the ISP's equipment or landline transport facilities, also located in Austin. In other words, even though part of the call from a CenturyTel customer to an ISP served by ASAP is an interstate telecommunication, *the part of the call served by ASAP* is entirely intrastate. Therefore, the Commission is not preempted from regulating ASAP's intrastate service to ISPs based solely on the interstate component of the overall jurisdictionally mixed telecommunication.

In summary, the ALJ concludes that calls to ASAP's ISP customers for purposes of accessing the Internet are jurisdictionally mixed telecommunications with both interstate and intrastate components. Under these circumstances, the Commission is not prohibited from imposing its certification or registration requirements upon ASAP's intrastate component if such regulation does not thwart or impede a valid federal policy. However, it is not clear that the services provided by ASAP to its ISP customers even falls within the Commission's certification or registration requirements. This evaluation is discussed in the issues below.

(3) Subissues 3-6:

Is ASAP's service to ISPs "basic local telecommunications service" as defined in PURA § 51.002(1)?

Is ASAP's service to ISPs "local exchange telephone service" as defined in PURA § 51.002(5)?

Is ASAP's service to ISPs "switched access service" as used in PURA § 54.001?

Does ASAP provide any service that requires it to register as a nondominant carrier under PURA § 52.103?

(a) Parties' Arguments

ASAP states that even if the service it provides to ISPs is intrastate, a certificate of authority is still not required because PURA § 51.003(5) exempts CMRS carriers from the certification and registration requirements contained in PURA. That section provides: "Except as expressly provided by this title, this title does not apply to . . . a provider of commercial mobile service as defined by Section 332(d), Communications Act of 1934 (47 U.S.C. Section 151 et seq), Federal Communications Commission Rules. . . ." ASAP emphasizes that the exemption contained in § 51.003(5) applies to "this title," which includes all of PURA, and that there is no express provision in the certification or registration sections that remove the CMRS exception. In other words, ASAP contends that a CMRS carrier is exempt from all registration and certification requirements contained in PURA, even if the services it provides may fall within the scope of some of the services described in PURA.

Alternatively, ASAP states that even if PURA does apply, which it denies, it is not required to obtain certification from the Commission under PURA § 54.001. That section provides:

Sec. 54.001. CERTIFICATE REQUIRED. A person may not provide local exchange telephone service, basic local telecommunications service, or switched access service unless the person obtains a:

- (1) certificate of convenience and necessity;
- (2) certificate of operating authority; or
- (3) service provider certificate of operating authority.

Thus, to require certification a person must provide "local exchange telephone service," "basic local telecommunications service," or "switched access." But ASAP argues that its service to ISPs does not constitute any of these services. The definitions of "basic local telecommunications service" and "local exchange telephone service" are contained in PURA § 51.002(1) and (5), respectively.

Section 51.002(1) provides:

- (1) "Basic local telecommunications service" means:
- (A) flat rate residential and business local exchange telephone service, including primary directory listings;
 - (B) tone dialing service;
 - (C) access to operator services;
 - (D) access to directory assistance services;
 - (E) access to 911 service provided by a local authority or dual party relay service;
 - (F) the ability to report service problems seven days a week;
 - (G) lifeline and tel -assistance services; and
 - (H) any other service the commission determines after a hearing is a basic local telecommunications service.

ASAP's witness, Mr. Ted Gaetjen, testified that the ISPs served by ASAP receive none of the services listed in § 51.002(1)(A)-(G), and that the Commission has not previously found that the service ASAP does provide to be basic service under the "catchall" subsection (1)(H). Thus, ASAP argues that its services are not basic service as defined in § 51.002(1).

Similarly, ASAP states, its service to ISPs is not "local exchange telephone service" as defined in § 51.002(5). That section provides:

(5) "Local exchange telephone service" means telecommunications service provided *within an exchange to establish connections between customer premises within the exchange*, including connections between a customer premises and a long distance provider serving the exchange. The term includes tone dialing service, service connection charges, and directory assistance services offered in connection with basic local telecommunications service and interconnection with other service providers. The term does not include the following services, whether offered on an intraexchange or interexchange basis:

- (A) central office based PBX -type services for systems of 75 stations or more;
- (B) billing and collection services;
- (C) high -speed private line services of 1.544 megabits or greater;
- (D) customized services;

- (E) private line or virtual private line services;
- (F) resold or shared local exchange telephone services if permitted by tariff;
- (G) dark fiber services;
- (H) non-voice data transmission service offered as a separate service and not as a component of basic local telecommunications service;
- (I) dedicated or virtually dedicated access services; or
- (J) any other service the commission determines is not a "local exchange telephone service.

ASAP state that the ISPs do not receive "tone dialing, directory assistance or connections to a long distance carrier." Instead, ISPs are only able to receive inbound traffic directed to the numbers they use. ASAP also emphasizes that it does not provide service to or between any customer "premises," which is defined in PUC SUBST. R. 26.5(156) as a "tract of land or real estate including buildings and other appurtenances thereon." Instead, ASAP claims that it makes its connection to the ISP at or near ASAP's switch in the same building as ASAP's switch. It claims that this is not service to a customer premise or between customer premises within an exchange. Instead, ASAP views its service to ISPs more like the services excluded from the definition of local exchange service, such as "customized service" under subsection (5)(D) and a "non-voice data transmission service offered as a separate service" under subsection (5)(H).⁶⁰

ASAP also notes that the term "switched access" used in § 54.001 is not defined in PURA, but suggests that it is typically understood to involve a connection between a voice user and a long-distance carrier. It points to the definition of the similar term "exchange access" contained in § 153(16) of the federal Act: "the offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." But because ASAP's ISP customers cannot make long distance calls,⁶¹ ASAP contends its service to ISPs does not include

⁶⁰ ASAP Initial Brief at 13-14.

⁶¹ ASAP Exh. 9 (Gaetjen Dir.) at 10-11.

switched access as used in PURA § 54.001. In any event, ASAP reiterates that as a CMRS provider it is exempt from both the certification and registration requirements contained in PURA.⁶²

Although PURA § 52.103 requires a "telecommunications utility" to register with the Commission,⁶³ ASAP states that no party claims that ASAP meets subsection (D), (F) or (G) of the "telecommunications utility" definition contained in PURA § 51.002(11):

- (11) "Telecommunications utility" means:
 - (A) a public utility;
 - (B) an interexchange telecommunications carrier, including a reseller of interexchange telecommunications services;
 - (C) a specialized communications common carrier;
 - (D) a reseller of communications;
 - (E) a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system;
 - (F) a provider of operator services as defined by Section 55.081, unless the provider is a subscriber to customer owned pay telephone service; and
 - (G) a separated affiliate or an electronic publishing joint venture as defined in Chapter 63.

ASAP also contends that it does not meet the definition of "interexchange carrier" set out in PUC Subst. R. 26.5(107),⁶⁴ and that ASAP is simply different than an IXC.⁶⁵ Further, the

⁶² ASAP Initial Brief at 15.

⁶³ Section 52.103(a) provides: "A telecommunications utility shall register with the Commission not later than the 30th day after the date the utility commences service to the public."

⁶⁴ PUC SUBST. R. 25.5(107) provides:

- (107) Interexchange carrier (IXC) - A carrier providing any means of transporting intrastate telecommunications messages between local exchanges, but not solely within local exchanges, in the State of Texas. The term may include a certificated telecommunications utility (CTU) or CTU affiliate to the extent that it is providing such service. An entity is not an IXC solely because of:
- (A) the furnishing, or furnishing and maintenance of a private system;
 - (B) the manufacture, distribution, installation, or maintenance of customer premises equipment;
 - (C) the provision of services authorized under the FCC's Public Mobile Radio Service and Rural Radio Service rules; or
 - (D) the provision of shared tenant service.

⁶⁵ ASAP Exh. 43 (Goldstein Reb.) at 3.

“interexchange carrier” definition expressly excludes CMRS, so ASAP does not qualify as a telecommunications utility under subsection 51.002(11)(B). ASAP also contends that it is not a specialized communications common carrier in the sense used in subsection (C) of the statute, which was intended to mean “Other Common Carrier” or “OCC.”

ASAP agrees that it does fall within subsection (E) of the telecommunications utility definition but reiterates that applying this subsection would require ignoring the express exception of CMRS from “this title” (PURA). It also states that the Commission has not previously required registration of CMRS providers. For example, the certification and registration question was not raised with regard to ASAP’s “paging” activities, yet literally applying subsection (E) would encompass such activities that all parties agree are “pure” CMRS. Therefore, ASAP argues that it is not required to register with the Commission as a non-dominant carrier under PURA § 52.103.

CenturyTel disagrees and argues that ASAP should be required to comply with the Commission’s certification and registration requirements. Because CenturyTel contends that ASAP’s ISP service is not CMRS, it argues that there is no federal preemption of any state certification or registration requirements that may apply. Further, CenturyTel states that if, as ASAP claims, its landline service to ISPs is local ELCS, then ASAP must be certificated as a provider of local exchange service. Alternatively, if the service is an interexchange service, then CenturyTel argues that ASAP must register as an IXC.⁶⁶

CenturyTel states that PURA § 54.001 requires certification of providers of local exchange service and providers of switched access services. The term “local service” is defined as a service which “establish[es] connections between customer premises within the exchange.”⁶⁷ While the definition includes other attributes of local exchange service such as tone dialing, etc., CenturyTel

⁶⁶ See CenturyTel Initial Brief at 8-10.

⁶⁷ PURA § 51.002(5).

states that the establishment of connections between customer premises is the heart of the definition, and it suggests that ASAP's service to ISPs provides such a connection, as it enables an ISP to receive calls at its premise in Austin from end users in San Marcos. And because such calls are sent from San Marcos to Austin, CenturyTel's argues that the service is actually interexchange service, not ELCS. But even if it is considered ELCS, then CenturyTel states that it is local exchange service, which ASAP may not provide without a certificate.

CenturyTel also states that the term "switched access" as used in PURA is roughly equivalent to the term "exchange access" as used in § 251 of federal Act; that is, "the provision of exchange services for the purpose of originating or terminating interexchange telecommunications."⁶⁸ Furthermore, CenturyTel states, the FCC orders relating to the service competitive local exchange carriers (CLECs) provide to ISPs recognize that "information access" may be a subset of "exchange access."⁶⁹

CenturyTel rejects ASAP's position that none of its services are subject to state certification or registration because it is a CMRS provider. CenturyTel argues that ASAP has failed to consider the phrase contained in PURA § 51.003(5) that states that PURA does not apply to a provider of commercial mobile service "*except as expressly provided by this title.*" In CenturyTel's view, the certification and registration requirements of PURA § 54.001 expressly include CMRS providers because that section requires any "person" offering local exchange service to be certificated. CenturyTel notes that the term "person" is a statutorily-defined term that includes an "individual, a partnership of two or more persons . . . , and a corporation"⁷⁰ Thus, CenturyTel concludes that corporations or individuals providing CMRS service are clearly within this definition of "person" and that ASAP is not exempt from registration or certification requirements.

⁶⁸ See *ISP Remand Order* at ¶ 37, n 65.

⁶⁹ *ISP Remand Order* at ¶ 42 and n.76.

⁷⁰ See PURA § 11.003(14) (defining "person").

(b) ALJ's Analysis

PURA § 54.001 provides that a person may not provide "local exchange telephone service," "basic local telecommunications service," or "switched access service" without obtaining a certificate from the Commission. Based on the evidence at hearing, the ALJ finds that ASAP's service to ISPs does not constitute any of these services that require certification. However, PURA § 52.103 and P.U.C. SUBST. R. 26.107 require entities that provide certain other non-certificated telecommunications services to register with the Commission. The ALJ does find that ASAP's service qualifies it as a "telecommunications utility," requiring it to register with the Commission.

Concerning "basic local telecommunications service" defined in PURA § 51.002(1), the record is clear that ASAP does not provide ISPs with flat rate residential and business local exchange telephone service, tone dialing service, access to operator services, access to directory assistance services, access to 911 services, the ability to report service problems seven days a week, or lifeline and tele-assistance services. Rather, ASAP merely provides a switch and wireline connection for the ISPs to receive modem calls from their customers. These are all *one-way calls to the ISPs*, and the ISPs themselves have no ability to place calls over the ASAP connection. Therefore, the ALJ finds that the services ASAP provides to ISPs is not basic local telecommunications service.

The ALJ also finds that ASAP does not provide "local exchange telephone service" as defined in PURA 51.002(5), which includes connections between customer premises within the exchange, tone dialing, service connection charges, and the like. Applying this definition, it is clear that ASAP does provide a telecommunications service to ISPs by connecting ISPs to the PSTN, and that ASAP provides this service entirely within one exchange. But ASAP's service is not used to "establish connections between customer premises within the exchange." Instead, ASAP only makes a relatively short connection between SWBT's tandem switch and the ISP's equipment at or near ASAP's switch. Further, ASAP only provides one-way service, and its ISP customers cannot call any other person and cannot reach any customer "premise." In short, ASAP's service simply does

not amount to "local exchange service" in the traditional sense, such as the service CenturyTel, SWBT, Verizon, and typical CLECs provide to their customers within an exchange. Rather, it provides a very limited, one-way service that merely connects ISPs to the PSTN. Therefore, the ALJ finds that ASAP's service is not "local exchange telephone service" as defined in PURA 51.002(5).

Likewise, the ALJ finds that ASAP's service to ISPs is not "switched access" as that term is used in PURA § 54.001. "Switched access" is not defined in PURA, but the ALJ agrees with the parties that the term is generally understood to involve providing a connection to a long-distance carrier. But ASAP's service to ISP customers only allows those customers to receive modem calls for purposes of accessing the Internet. ISPs are not long-distance carriers and ASAP's ISP customers cannot themselves initiate any calls or connect to a long-distance carrier over ASAP's facilities. Therefore, the ALJ concludes that ASAP's service to ISPs does not include "switched access" service that requires ASAP to obtain certification under PURA § 54.001.

The ALJ does find, however, that ASAP must register under PURA § 52.103. This section provides that "A telecommunications utility shall register with the commission not later than the 30th day after the date the utility commences service to the public." Further, PURA § 51.002(11)(E) defines the term "telecommunications utility" to include "a communications carrier who conveys, transmits, or receives communications wholly or partly over a telephone system." ASAP concedes that it falls within the scope of this definition in (11)(E), but argues that it is exempt from the registration requirements because PURA does not apply to CMRS carriers under PURA § 51.003. Thus, ASAP points out that its paging service also falls within the terms of the telecommunications utility definition, but all parties agree that it is not required to register for its CMRS paging services. But the ALJ disagrees with ASAP's argument that *non-CMRS services* are excluded from coverage by PURA, and, as previously discussed, ASAP's service to ISPs is not CMRS or incidental to CMRS. The CMRS exception at § 51.003(5) provides: "Except as otherwise expressly provided by this title, this title does not apply to . . . a provider of commercial mobile service as defined by Section 332(d), Communications Act of 1934" None of the parties cite any authority

interpreting this section, but ASAP seems to contend that its CMRS license precludes the application of PURA to it regardless of the telecommunications service that ASAP may choose to provide, based solely on its status as a licensed CMRS provider. But the ALJ disagrees and concludes that the exception for CMRS providers contained in § 51.003(5) applies only to ASAP's CMRS services, or services incidental to its CMRS authority.

PURA provides an exemption for CMRS providers because regulation of CMRS is preempted by federal law and is within the exclusive authority of the FCC. Thus, any conflicting regulation by the state of Texas would violate the Supremacy Clause of the U.S. Constitution. But ASAP's license and the FCC's authority is limited to ASAP's CMRS services and incidental services, and there is no conflict between state and federal regulation when the state regulates non-CMRS services. First, ASAP's CMRS license does not authorize it to provide any non-CMRS services. Rather, the only authority granted by ASAP's license is "to use and operate the radio transmitting facilities herein described."⁷¹ In addition, 47 C.F.R. § 22.3(a) provides that a CMRS license does not create any additional rights: "The holding of an authorization does not create any rights beyond the terms, conditions and period specified in the authorization." Therefore, it is clear that ASAP's federal CMRS license does not authorize it to provide non-CMRS services, and specifically does not grant ASAP authority to provide ISPs a landline connection to the PSTN. Thus, applying PURA to such non-CMRS services would not cause a conflict between state and federal regulation, which is the purpose of the CMRS exemption in § 51.003(5). Indeed, taking ASAP's argument to its logical conclusion would mean that ASAP could provide any telecommunications service it chooses without Commission regulation, or that any other telecommunications provider could escape all of PURA's coverage simply by obtaining a CMRS license. This argument stretches the CMRS exemption beyond its reasonable limits. Instead, the ALJ concludes that the CMRS exception contained in § 51.003(5) is reasonably interpreted to mean that PURA does not apply to a CMRS provider for its CMRS services or any services incidental to

⁷¹ ASAP Exh. 1:

CMRS. But because the ALJ has found that ASAP's service to ISPs is not incidental to its CMRS authority, the ALJ concludes that the CMRS exception does not apply to that service and that ASAP must register with the Commission under PURA § 52.103.

2. Preliminary Order Issue No. 2

To the extent ASAP is a CMRS provider for paging services, are calls from CenturyTel customers in San Marcos to ASAP paging customers with a 512-384 paging number eligible for ELCS? If so,

- 1. May ASAP designate the calling path the traffic takes before termination?**
- 2. If ASAP does designate the path, does the manner in which it designates the calling path impact the ELCS eligibility of the traffic?**
- 3. Is CenturyTel in violation of the Commission's order in Project No. 13267, which established ELCS between Lockhart and San Marcos?**
- 4. Is CenturyTel in violation of its Texas General Exchange tariff?**

a. Introduction

This issue is at the heart of ASAP's case; that is, whether CenturyTel can charge its own customers toll for calls from San Marcos to ASAP's NXXs, or whether these calls should be rated as local calls under ELCS. Although the issue refers specifically to paging customers and ASAP's Lockhart 384-NXX, this proposal for decision considers the ELCS issue with respect to both paging calls and calls to ASAP's ISP customers, and with respect to ASAP's Lockhart, Kyle, and Fentress NXXs.

The parties' ultimate positions are straightforward. ASAP contends that retail rating should be based solely on the exchange with which the called NXX is "associated," and because it has associated its NXXs with the Lockhart, Kyle, and Fentress exchanges, which are ELCS to San Marcos, ASAP argues that calls from San Marcos to these NXXs must be rated as ELCS local. CenturyTel rejects ASAP's position and characterizes ASAP's arrangement as a disfavored "virtual"

NXX plan. Instead, CenturyTel contends that retail rating should be based on the location of the called and calling parties. This causes some complications, however, because the location of a called wireless mobile paging customer cannot be determined, and ASAP's paging system broadcasts pages over a wide area of the state, or even nationwide, depending on the plan selected by the paging customer. Therefore, CenturyTel contends that the location of ASAP's paging terminal – where the landline service terminates – should serve as a proxy for the paging customers' location. Likewise, CenturyTel states that calls to ASAP's ISP customers are delivered to the ISPs in Austin, and because Austin is long distance to San Marcos, CenturyTel argues that both paging calls and calls to ISPs using ASAP's Lockhart, Kyle, and Fentress NXXs should be retail rated as toll, regardless of the exchange with which ASAP has "associated" these NXXs. After carefully considering the evidence and the parties' arguments, the ALJ believes that CenturyTel's position is the proper method for determining whether a call is local or long-distance for retail rating purposes under the sections of PURA and the Commission rules applicable to ELCS.⁷²

b. Do calls to ASAP's Lockhart, Kyle, and Fentress NXXs qualify for ELCS?

(1) **ASAP's Position**

The essence of ASAP's position is that calls must be retail rated based on the exchange with which the called NXX is associated, regardless of how the call is routed or switched and regardless of the physical location of the called party. Thus, ASAP contends that calls to ASAP's customers with NXXs associated with Kyle, Fentress, and Lockhart must be retail rated as calls to those exchanges, and since those exchanges are ELCS to San Marcos, calls to these NXXs must be rated as ELCS local.

⁷² The ALJ emphasizes, however, that this applies only to retail rating of calls and not to carrier interconnection agreements or intercarrier compensation issues, which are not before the Commission in this proceeding.

Mr. Fred Goldstein testified for ASAP that NXX rate center assignment determines retail rating for a call. Normally, the ILEC defines the rate center, and competitive carriers "associate" their NXXs with the ILEC rate center. Mr. Goldstein stated that all carriers must respect other carriers' rate center assignment in order for the nation's telephone system to function properly.⁷³ To buttress its position, ASAP quotes the FCC *Virginia Arbitration* opinion by the Wireline Competition Bureau:

We . . . reject Verizon's language that would rate calls according to their geographical end points. Verizon concedes that NPA-NXX rating is the established compensation mechanism not only for itself, but industry-wide. The parties all agree that rating calls by their geographical starting and ending points raises billing and technical issues that have no concrete, workable solutions at this time.⁷⁴

Likewise, ASAP quotes the FCC *NRO NPRM*, which states that "most carrier billing systems rely on NPA-NXX code information for rating calls."⁷⁵

Based on these authorities, ASAP rejects CenturyTel's argument that calls should be retail rated based on the location of the called party or on any criteria other than the called party's NXX. First, ASAP stresses that it is impossible to determine the location of a person receiving a wireless page because the transmission is one-way to the pager. Thus, it contends that the notion of the

⁷³ Tr. at 261-62, 729-30; ASAP Exh. 10 (Goldstein Dir.) at 9-10; ASAP Exh. 43 (Goldstein Reb.) at 5..

⁷⁴ Memorandum Opinion and Order, *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia, Inc., and for Expedited Arbitration*, ¶ 52, CC Docket No. 00-218, DA 02-1731, 2002 FCC LEXIS 3544 (Wireline Comp. Bureau, rel. July 17, 2002) (*FCC Virginia Arbitration*).

⁷⁵ *In the Matter of Numbering Resource Optimization; Connecticut Department of Public Utility Control Petition for Rulemaking to Amend the Commission's Rule Prohibiting Technology-Specific or Service-Specific Area Code Overlays; Massachusetts Department of Telecommunications and Energy Petition for Waiver to Implement a Technology-Specific Overlay in the 508, 617, 781, and 978 Area Codes; California Public Utilities Commission and the People of the State of California Petition for Waiver to Implement a Technology-Specific or Service-Specific Area Code*, FCC 99-122, CC Docket No. 99-200; RM No. 9258; NSD File No. L-99-17; NSD File No. L-99-36, 14 FCC Rcd 10322, 1999 FCC LEXIS 2451 (Rel. Jun. 2, 1999) (*NRO NPRM*) (emphasis added by ASAP).